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No. 85-694

In the Supreme Court of the United States

October Term, 1985

DOUGLAS A. DOWTY,
Petitioner,

vs.

PIONEER RURAL ELECTRIC COOPERATIVE, INC.,
UTILITY WORKERS UNION OF AMERICA,
Respondents.

REPLY BRIEF OF PETITIONER
In Support of Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

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Before addressing the arguments set forth in the opposing briefs submitted by each respondent, a few factual clarifications are in order. Within its Statement of the Case at pages 2 and 3 of respondent Union's Brief in Opposition, it is stated that on July 7, 1981, a Union official orally informed Dowty that he could continue to sell, install and service electric generators. The Union official at that time orally contradicted the terms of the actual arbitration award, appearing at page A20 of the appendix to respondent Union's brief. The written decision, appearing at pages A4 through A19 of respondent Union's appendix was not read at the meeting and petitioner did

not see it until he received his copies of the arbitration results on July 10, 1981. The last paragraph of the opinion, appearing at page A19 of respondent Union's appendix, contradicts the language of the actual award in that it appears not to prohibit outside business activity.

The point, however, is that with his copies of the decision and award received on July 10, 1981, petitioner received a termination letter from Pioneer stating that petitioner's position would be terminated within ten days unless he elected to comply with the mandate of the award and cease all outside business activity. It is for this reason that petitioner did not know of his injury until July 10, 1981. Union officials misrepresented the resolution of the issue at the heart of the arbitration. Obviously, the employer Pioneer, through its termination letter, intended to discharge petitioner unless he decided to terminate all outside business. *See* termination letter at page A24 of the appendix to respondent Union's Brief in Opposition. Then and only then did appellant learn of his injury so as to compel institution of the instant hybrid action.

I.

Conflict Among the Circuit Courts of Appeals

Curiously, both respondents take the position that the accrual rule adopted by the Sixth Circuit below is applied by all circuits. The position taken is tragically inaccurate from a reading of the cases. The Eleventh Circuit and Fifth Circuit, subsequent to this Court's decision in *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151 (1983), looked to the time that the employee learned of his injury, not the time of discovery of the Union's breach of duties. *Benson v. General Motors Corp.*, 716 F.2d 862 (11th Cir. 1983); *Farr v. H. K. Porter Co., Inc.*, 727 F.2d 502 (5th

Cir. 1984). There is a dramatic difference between the two rules in that one ignores the existence of injury and the other takes it into consideration. In fact, one of the decisions cited by both respondents uses an entirely different accrual rule which, again, was not the rule used by the Sixth Circuit in the case at bar. The court in *Craft v. Automotive, Petroleum & Allied Industries Employees Union, Local 618*, held that a hybrid action accrues "on the date the employee's grievance is finally rejected and his contractual remedies are exhausted." 784 F.2d 800, 803 (8th Cir. 1985). In summary, a statement that the circuits have universally adopted the accrual rule used by the Sixth Circuit herein is simply "not so".

II.

National Uniformity and the Importance of the Time of Accrual Question in Hybrid Actions

Both respondents take the position that all petitioner wants this Court to do is hold that a hybrid §301/fair representation action cannot accrue until an employee has received a copy of the written arbitration award. None of the Questions Presented by petitioner makes reference to this point and it ignores the true theme of petitioner's request for a writ of certiorari and the general rules this Court follows for consideration of certiorari petitions. Petitioner has advanced that due to the importance of national uniformity in the labor law area a single rule of accrual as of the time of discovery of injury should be adopted, as the rule adopted by the lower courts herein, accrual as of the time of the discovery of the Union's wrongful conduct only, fails to serve underlying federal labor law policies.

In fact, respondent Union implicitly admits that the rule petitioner advances is more appropriate by spending

a great portion of its opposing brief discussing the point at which petitioner Dowty knew or should have known of his injuries herein. The Sixth Circuit, however, considered only the issue of when petitioner learned of the Union's breach of its duty of fair representation. At best, all the Union's opposing brief shows is that a factual issue exists as to when petitioner learned of his injuries as a result of the wrongful conduct alleged in his complaint—something petitioner has asserted all along.

An injured employee considering the institution of a hybrid §301/fair representation action is given considerably less time than most other injured parties contemplating a lawsuit. The point at which the period of time begins to run in hybrid actions is thus doubly important. It is a balancing of all the competing interests, as this Court did in *DelCostello* when it decided the applicable limitations provision, which warrants consideration of the instant case on the merits.

CONCLUSION

For all of the foregoing reasons, petitioner Douglas A. Dowty respectfully prays that the Court issue a writ of certiorari as requested.

Respectfully submitted,

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